

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the amendment)	
of ARM 17.8.1213, pertaining to)	
requirements for air quality)	HEARING OFFICER REPORT
operating permit content)	
relating to compliance)	

On November 5, 2003, I conducted a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the proposed amendment to ARM 17.8.1213, pertaining to requirements for compliance content in air quality operating permits, included in Montana Administrative Register (MAR) Notice No. 17-199, published on October 16, 2003, a copy of which is attached to this report.

The hearing began at 1:30 p.m. Teresa Straugh, a court reporter, transcribed the hearing.

At the beginning of the hearing, I stated the date and number of the MAR notice, invited everyone to get a copy of the MAR notice which was available if they didn't already have one, and read the "Notice of Function of Administrative Code Committee," referred to in Mont. Code Ann. § 2-4-302(7)(a).

Jan Brown, Rule Development Specialist in the Air and Waste Management Bureau of DEQ, submitted written testimony in support of the proposed rulemaking. A copy of that submission is attached. David Rusoff, a staff attorney for the DEQ, submitted

an analysis of House Bills 311 and 521 issues (codified at Mont. Code Ann. §§ 75-2-207 and 2-10-101 through -105), though he did not testify. Copies of Mr. Rusoff's analysis are attached.

No one appeared at the hearing. The public comment period remained open after the hearing until 5 p.m., November 13, 2003. No written comment was received.

SUMMARY OF HEARING TESTIMONY

1. Jan Brown, Rule Development Specialist, Air and Waste Management Bureau, Montana Department of Environmental Quality.

Ms. Brown testified that the Department is requesting the Board amend ARM 17-8-1213, regarding Title V annual compliance certifications, to include a report on whether the reporting facility's compliance was continuous or intermittent during the reporting period. This proposed amendment is necessary because the Environmental Protection Agency (EPA) has recently amended their rule in response to a court order. See, 68 FR 38517, amending 40 CFR 70.6(c)(5)(iii)(B) and 70.6 (c)(5)(iii)(C). These federal regulations were revised by the EPA in response to the court's decision in Natural Resources Defense Council, Inc. v. EPA, 194 F.3d 130 (D.C. Cir. 1999). The State must adopt the revisions to the federal regulations to maintain the State's delegation of authority from the EPA and the State's primacy to enforce the Title V operating permit program.

The current rule requires the responsible officials in their annual certification to identify each term and/or condition of the permit, the method(s) or other means used to identify the status of compliance, and whether the methods used will provide continuous or intermittent data. The responsible official then identifies if the facility was in or out of compliance with each permit term. The amendment would require responsible officials to identify each permit term or condition and whether compliance with that term or condition was continuous or intermittent during the reporting period.

2. David Rusoff, Legal Counsel, Montana Department of Environmental Quality

Mr. Rusoff's memorandum states that the amendment adopts the identical federal requirement, so the proposed amendment would not make the state rule more stringent than the federal rule. No further House Bill 521 analysis is necessary.

House Bill 311, codified as Mont. Code Ann. §§ 2-10-101 through -105, requires the state to assess taking or damaging impact of an action that has taking or damaging implications for private property. This rule does add a requirement to Title V air quality operating permits that the responsible party certify whether the compliance was continuous or intermittent during the reporting period which may affect real property. The proposed rule may affect the use of private real property and the Board

has the discretion not to take proposed action. Mr. Rusoff prepared the Attorney General's Private Property Assessment Act Checklist (Checklist). On completion of the Checklist, the proposed rulemaking does not have taking or damaging implications, and no further House Bill 311 assessment is required.

HEARING OFFICER COMMENTS

1. The Board has jurisdiction to amend this rule. Montana Code Annotated § 75-2-217 provides that the Board "shall provide by rule for the issuance, expiration, modification, amendment, suspension, revocation, and renewal of operating permits as part of the operating permit program to be administered by the department under this chapter. The board shall promulgate rules that are consistent with the operating permit framework and guidelines outlined in Subchapter V of the federal Clean Air Act and implementing regulations." The proposed amendment appears to be within the scope of the Board's statutory authority and does not exceed the scope of public notice of proposed rulemaking. The public notice, public hearing, and public comment met the requirements of Mont. Code Ann. § 2-4-302.

2. The amendment is not more stringent than existing federal standards, therefore HB 521 findings are not necessary.

3. House Bill 311 (1995), the Private Property Assessment Act, codified as Mont. Code Ann. §§ 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. This rule may affect real property and the Board has discretion as to whether or not to adopt the rule or take some other action that may impact private property less than this rule. A Private Property Assessment Act Checklist is required in this matter. The proposed changes to the rule would not have taking or damaging implications because they would not:

- ✓ result in either a permanent or indefinite physical occupation of private property;
 - ✓ deprive any owner of all economically viable uses of private property;
 - ✓ deny a fundamental attribute of private property ownership;
 - ✓ deprive the owner of all economically viable uses of the property;
 - ✓ require a private property owner to dedicate a portion of property or grant an easement;
 - ✓ have a severe impact on the value of private property;
- or

- ✓ damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based on these findings, no further HB 311 assessment is necessary.

4. The Board may adopt or reject the proposed rulemaking, or it may adopt the proposed measures with revisions not exceeding the scope of the public notice. Under Mont. Code Ann. § 2-4-305(7), for any acts in the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board published the notice of proposed rulemaking in the Montana Administrative Register, or by April 13, 2004.

Dated this _____ day of November, 2003.

KELLY O'SULLIVAN
Hearing Officer